IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

PROSCAPE TECHNOLOGIES, INC., Plaintiff,	:	March Term 2004
v.	:	No. 1902
INFOLOGIX, INC., Defendant.	:	Commerce Program
	:	Control Number 070699

ORDER and OPINION

AND NOW, this 15TH day of August 2005 upon consideration of Proscape Technologies, Inc.'s Emergency Petition to Permanently Stay Arbitration Proceeding pursuant to 42 Pa. C. S. § 7304, responses in opposition, Memoranda, all matters of record and in accord with the contemporaneous Memorandum Opinion to be filed of record, it hereby is **ORDERED** and **DECREED** that said Petition is **Denied.**

BY THE COURT,

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HOWLAND W. ABRAMSON, J.

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	:	Control Number 070699

OPINION

ABRAMSON, J.

Presently before the court is Petitioner Proscape Technologies, Inc.'s Emergency Petition to Permanently Stay Arbitration Proceedings pursuant to 42 Pa. C.S. § 7304. For the reasons discussed below, the Petition is denied.

BACKGROUND

Petitioner Proscape Technologies, Inc. (hereafter "Proscape") is in the business of developing and distributing software systems. Responsent InfoLogix (hereafter "InfoLogix) is in the business of marketing, selling and providing mobile wireless computer hardware and software to various industries.

On or about May 2002, InfoLogix, entered into a Master Software Licensing Agreement (hereafter "Licensing Agreement") with Proscape. The parties also entered into a Sales Agreement.[1] The License Agreement granted InfoLogix a limited, terminable, revocable, nontransferable, nonexclusive license to use Proscape's software in the ordinary course of InfoLogix's business operations for its own business purposes

[1] The Sales Agreement is the subject of dispute in the instant action as well as the action captioned InfoLogix v. Proscape Technologies, Inc., May 2005 No. 3410.

and in accordance with the related documentation. Exh. "A" Licensing Agreement-Terms ¶¶ 2, 3.

The Licensing Agreement contains an arbitration clause which states:

> 18. Disputes
>
> 18.1 Arbitration. The parties shall submit all claims and disputes arising under this Agreement to arbitration in Philadelphia, Pennsylvania, in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). Either Party may initiate the arbitration process by sending notice to the other party of the initiating Party's intention to submit a claim or dispute to arbitration as provided under this Agreement. The arbitrator shall use all reasonable efforts to complete the arbitration proceedings as rapidly as possible.

Paragraph 18 Dispute also provides a remedy provision which limits the authority of the arbitrator to award damages to the prevailing party. The provision provides:

> 18.4 Remedies
>
> > The measure of damages for the prevailing Party will be the actual damages of that Party; the arbitrator may issue injunctive relief but will not award attorney's fees or punitive, incidental, consequential, treble, or other multiple or exemplary damages, or modify any provision of this Agreement; and the jurisdiction of the arbitrator shall be so limited.

InfoLogix filed a statement of claim against Proscape with the American Arbitration Association alleging claims for breach of contract (count I), unjust enrichment (count III), conversion (count IV) and termination of the licensing agreement (count IV).[2] Proscape now petitions the court to stay the arbitration on the grounds that

[2] The Statement of Claim omits count II.

the damages and remedies sought by InfoLogix in its Statement of Claim are not within the scope of the arbitration provision.

DISCUSSION

A court may stay arbitration proceedings on a showing that there is no agreement to arbitrate. 42 Pa. C. S. § 7302 (b). Pennsylvania law "favors settlement of disputes by arbitration as a means of promoting swift and orderly disposition of claims." School Dist. v. Livingston-Rosenwinkel, P.C., 690 A.2d 1321, 1322-23 (Pa. Commw. 1997)(*citing* Flightways Corp. v. Keystone Helicopter Corp., 331 A.2d 184, 185 (Pa. 1975)).

A court's analysis of whether a claim is required to be arbitrated is limited. Our Superior Court has held:

> When one party to an agreement seeks to prevent another from proceeding to arbitration, judicial inquiry is limited to determining (1) whether a valid agreement to arbitrate exists between the parties and, if so, (2) whether the dispute involved is within the scope of the arbitration provision.

University Mechanical & Engineering Contractors, Inc. v. Insurance Co. of No. America, November Term 2000 No. 1554 (October 28, 2002) (Sheppard, J.) (*citing* Midomo Co., v. Presbyterian Hous. Dev. Co., 739 A.2d 180, 186 (Pa. Super. 1999)(*quoting* Smith v. Cumberland Group, 687 A.2d 1167 (Pa. Super. 1997)). Thus, some determinations relating to whether a case should be arbitrated are to be made by the court, but others are to be resolved by an arbitrator. "The question of whether the parties agreed to arbitrate, commonly referred to as 'substantive arbitrability,' is generally one for the courts and not for the arbitrators…On the other hand, resolution of procedural questions, including whether the invocation of arbitration was proper or timely is left to the arbitrator." Ross Dev. Co. v. Advanced Bldg. Dev., Inc., 803 A.2d 194, 196 (Pa. Super. 2002).

For matters of substantive arbitrability, a court must apply two principles: (1) arbitration agreements are to be strictly construed and not extended by implication; and (2) when parties have agreed to arbitrate in a clear and unmistakable manner, every reasonable effort should be made to favor the agreement unless it may be said with positive assurance that the arbitration clause involved is not susceptible to an interpretation that covers the asserted dispute. Midomo, 739 A.2d at 190. To apply both rules the court should employ the rules of contractual construction, "adopting an interpretation that gives paramount importance to the intent of the parties and ascribes the most reasonable, probable, and natural conduct to the parties." Midomo, at 190-91.

Here the parties agree that a valid agreement to arbitrate exists within the Licensing Agreement, but they disagree whether the damages and remedies sought by InfoLogix are within the scope of the Licensing Agreement's arbitration provision. (Proscape's Petition p. 9).

In support of its petition to stay arbitration, Proscape contends that the damages alleged by InfoLogix are specifically excluded from the scope of the License Agreement by ¶ 18.4 Remedies and therefore are expressly excluded from the jurisdiction of the arbitrator. While InfoLogix agrees that ¶ 18.4 does place limits on the types of damages that the arbitrator can award, it does not limit the disputes which are arbitrable under the Agreement.

The plain language of 18.1 Arbitration reveals that the parties "shall submit all claims and disputes arising under the Licensing Agreement to Arbitration." Petition Exh. "A" at ¶ 18. InfoLogix's Statement of Claim purports to allege claims which arise from the Licensing Agreement such as Proscape's (1) alleged failure to deliver the required

Software, Exh. "A" Statement of Claim ¶ 10, (2) alleged failure to perform the required maintenance and support for its Software, Id. ¶ 11, (3) alleged failure to supply InfoLogix with performance time improvements and updates of the Software "fixes" as required to operate the Software as it intended, Id. ¶ 12 and (4) failure to provide InfoLogix with appropriate responses to questions concerning defects in the software and help desk, Id. ¶ 13-14. Said allegations constitute disputes arising from the Licensing Agreement and are appropriate for arbitration.

It is equally clear from ¶ 18.4 Remedies that the parties agreed to place limits on the types of damages that the arbitrator can award. According to 18.4 Remedies, the arbitrator "may issue injunctive relief or actual damages but may not award attorney's fees or punitive, incidental, consequential, treble or other multiple or exemplary damages." This provision, contrary to Proscape's position, does not limit the claims that are subject to arbitration but limits the types of damages which an arbitrator may award. This interpretation is consistent with ¶ 16 Limitation of Liability of the Licensing Agreement which provides for the identical limitation on damages. The powers of the arbitrators arise out of the agreement submitting the dispute to them, and they are limited to act only on those issues and to fashion only those remedies which the agreement itself permits. Sley System Garages v. Transport Workers Union of America, 406 Pa. 370, 178 A.2d 560 (1962).

Paragraph 18.4 provides a framework for the arbitrator to follow when awarding damages and does not exclude such claims from arbitration. *Cf*. Zoological Soc'y v. Intech Constr. Inc., 48 Pa. D. & C. 4th 542 (2002) (Sheppard. J.)(Where the parties contractually agreed to exclude claims and/or disputes in excess of $100,000.00 from the

scope of the contract's arbitration provision, Defendant could not arbitrate its dispute with Plaintiff because its claims, although each separately below the contractual limit, exceeded that limit in the aggregate.). Hence, since the subject dispute falls within those claims or disputes subject to arbitration, Proscape's petition is denied.

CONCLUSION

For the foregoing reasons, Proscape's Emergency Petition to Stay Arbitration is Denied. An Order consistent with this Opinion will follow.

BY THE COURT,

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HOWLAND W. ABRAMSON, J.